



[TRANSLATION]

Citation: *SM v Canada Employment Insurance Commission*, 2022 SST 1220

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

**Decision**

**Appellant:** S. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (462620) dated March 23, 2022 (issued by Service Canada)

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**Tribunal member:** Normand Morin

**Type of hearing:** Teleconference

**Hearing date:** October 20, 2022

**Hearing participant:** Appellant

**Decision date:** November 18, 2022

**File number:** GE-22-1678

## Decision

[1] The appeal is allowed. I find that the Appellant didn't lose her job because of misconduct.<sup>1</sup> This means that her disqualification from receiving Employment Insurance (EI) regular benefits as of December 5, 2021, isn't justified.

## Overview

[2] From August 2015 to December 6, 2021, inclusive, the Appellant worked as a legal secretary for X (employer) and stopped working there after being let go. The employer says it let the Appellant go because she didn't follow instructions given to her and because of work that was done improperly or not done.

[3] On February 24, 2022, the Canada Employment Insurance Commission (Commission) told her that she is disqualified from receiving EI regular benefits as of December 5, 2021, since she stopped working for the employer on December 6, 2021, because of misconduct.<sup>2</sup>

[4] On March 23, 2022, after a request for reconsideration, the Commission told her that it was upholding the February 24, 2022, decision.<sup>3</sup>

[5] The Appellant says that she didn't lose her job because of misconduct. She says that in October 2021, the employer gave her many instructions that she didn't have to follow before (for example, not eating at her workstation, not having a cell phone that is on at her desk, going to the washroom often). The Appellant says that the employer then criticized her for not following those instructions, getting to work late, and not having done her work or not doing it well. She says she gave the employer explanations when it criticized her for not following certain instructions or for her tardiness. The Appellant says that she didn't get an explanation from the employer about the work it says she didn't do correctly. She says that she didn't get many of the notices the employer sent the Commission about the acts it says she committed and the specific

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<sup>1</sup> See sections 29 and 30 of the *Employment Insurance Act* (Act).

<sup>2</sup> See GD3-34 and GD3-35.

<sup>3</sup> See GD2B-2, GD3-45, and GD3-46.

reasons why measures were applied to her (for example, suspensions without pay). The Appellant says the employer discriminated against her, because it asked her to follow instructions it didn't give other employees and this was a form of harassment toward her. She says that she was let go unfairly and is entitled to benefits. On April 22, 2022, she challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

## Issues

[6] I have to determine whether the Appellant lost her job because of misconduct.<sup>4</sup> To decide this, I have to answer the following questions:

- Why did the Appellant lose her job?
- Is the reason for the Appellant's dismissal misconduct under the Act?

## Analysis

[7] The Act doesn't define the term "misconduct." Decisions by the Federal Court of Appeal (Court) describe the concept of misconduct.

[8] In one of its decisions, the Court said that, to be misconduct, "the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."<sup>5</sup>

[9] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless as to "approach wilfulness," meaning that it is almost wilful.<sup>7</sup>

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<sup>4</sup> See sections 29 and 30 of the Act.

<sup>5</sup> The Federal Court of Appeal (Court) established this principle in *Tucker*, A-381-85.

<sup>6</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>7</sup> The Court established this principle in *McKay-Eden*, A-402-96.

[10] For their behaviour to be misconduct under the Act, the claimant doesn't have to have wrongful intent; in other words, they don't have to mean to be doing something wrong.<sup>8</sup>

[11] There is misconduct if the claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being let go because of that.<sup>9</sup>

[12] To determine whether the misconduct could result in dismissal, there must be a link between the claimant's misconduct and the loss of their job. So, the misconduct has to be a breach of an express or implied duty resulting from the contract of employment.<sup>10</sup>

[13] The Commission has to prove that the claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities.<sup>11</sup> This means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.<sup>12</sup>

### **Issue 1: Why did the Appellant lose her job?**

[14] In a letter to the Appellant, dated December 16, 2021, the employer told her that she was being let go for the following reasons: [translation] "Not following the employer's instructions (insubordination), work done improperly, work not done."<sup>13</sup> The letter indicates that the Appellant was verbally let go on December 6, 2021. The document mentions notices given to the Appellant on the following dates: October 14, 2021, October 18, 2021, November 29, 2021, and December 1, 2021. The letter says that all the notices specified that if instructions weren't followed, the Appellant would be

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<sup>8</sup> The Court established this principle in *Secours*, A-352-94.

<sup>9</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>10</sup> The Court established this principle in *Lemire*, 2010 FCA 314.

<sup>11</sup> The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

<sup>12</sup> The Court established this principle in *Bartone*, A-369-88.

<sup>13</sup> See document entitled [translation] "Letter to [name of Appellant] 16-21-2021.pdf"—GD3-31.

let go. The document also indicates that the last notice specified that she would be let go the next time she didn't follow instructions, as was written on October 14, 2021.<sup>14</sup>

[15] The employer's statements to the Commission also show the following:

- a) Before the Appellant was let go, meetings were held with her and she was told many times about the acts the employer says she committed (insubordination, not following instructions, work done improperly or not done).<sup>15</sup>
- b) It is a [translation] "kind of incompetence" in the Appellant's case. Her work was either not done or done improperly. The Appellant had been competent in the past. She worked for the employer for many years before the alleged events happened. These events happened after the Appellant went back to work after maternity leave. The employer doesn't believe the Appellant tried to be let go on purpose, but that she seemed [translation] "unaware" of the problems or didn't seem concerned with how they could affect her job.<sup>16</sup>
- c) The Appellant was told not to eat at her desk. The employer gave her another 10-minute break to eat since she wasn't able to in the morning.<sup>17</sup>
- d) She was told that her cell phone [translation] "should not come into work." The Appellant would go to the washroom to eat and to write text messages. She would come out of the washroom and could not remember what the employer had asked her to do.<sup>18</sup>
- e) Errors were found in files; correcting them required at least two days of work.<sup>19</sup>

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<sup>14</sup> See document entitled [translation] "Letter to [Appellant's name] 16-12-2021.pdf"—GD3-31.

<sup>15</sup> See GD3-20, GD3-21, and GD3-43.

<sup>16</sup> See GD3-20 and GD3-21.

<sup>17</sup> See GD3-20, GD3-21, and GD3-43.

<sup>18</sup> See GD3-20 and GD3-21.

<sup>19</sup> See GD3-22.

- f) The employer asked the Appellant to focus on the work she had to do.<sup>20</sup>
- g) The Appellant was getting to work late. She was told to follow her work schedule.<sup>21</sup>
- h) Since the Appellant wasn't following instructions, the employer asked her to confirm—every day—when she was at her workstation, when she left it, and when she was away.<sup>22</sup>
- i) The employer suggested she ask for help or seek resources if she was having personal or family problems. It offered support (for example, notary and employee assistance program), gave her a plan with instructions to follow, made many accommodations, and repeated that the goal of the measures wasn't to let her go, but to enable her to improve her work efficiency. The Appellant was given paid training in time management just before she was let go so she could learn to better manage her time and meet expectations.<sup>23</sup>
- j) The Appellant was given many verbal notices and written disciplinary notices, and was even suspended before she was let go.<sup>24</sup>
- k) The Appellant was first suspended for one day—for half a day on October 18, 2021, in the afternoon, and for half a day on October 19, 2021, in the morning. She was then suspended for not following instructions, because she had eaten at her desk.<sup>25</sup>
- l) After being suspended, the Appellant got to work late.<sup>26</sup>

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<sup>20</sup> See GD3-20 and GD3-21.

<sup>21</sup> See GD3-20, GD3-21, and GD3-43.

<sup>22</sup> See GD3-20 and GD3-21.

<sup>23</sup> See GD3-20, GD3-21, and GD3-43.

<sup>24</sup> See GD3-20 and GD3-21.

<sup>25</sup> See GD3-43.

<sup>26</sup> See GD3-20 and GD3-21.

- m) The Appellant was warned that she would be let go if it happened again.<sup>27</sup>
- n) The Appellant was suspended as of December 1, 2021. In the December 1, 2021, written notice, the Appellant was warned that she would be let go the next time she didn't follow instructions.<sup>28</sup> On December 6, 2021, she got to work late. The employer says that she wasn't a few minutes late; she was about 15 minutes late. By getting to work late when she was returning from her suspension, the employer says that it was clear the Appellant wasn't ready to follow instructions.<sup>29</sup>
- o) The employer didn't want to let the Appellant go, but says that it didn't have a choice, since she had been warned many times to follow instructions.<sup>30</sup>

[16] On February 22, 2022, the employer sent the Commission copies of the following documents:

- a) Written summary dated October 14, 2021, about a meeting between the Appellant and the employer on October 13, 2021.<sup>31</sup> This document indicates that instructions were given to the Appellant, like: The Appellant's cell phone can't be at the office and if it is, it has to be closed or turned off. The Appellant can't eat at the office, but she can during her breaks. She has to be at her computer from 8 a.m. to 1:30 p.m., ready to work. She has to send the employer an email when she gets to work and when she leaves, as well as before and after each break in the morning and afternoon, no more than 10 minutes after she gets back. Every morning she has to give the employer a list of work to do, and, in the afternoon, a list of things she did. The document indicates measures would be applied if instructions weren't

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<sup>27</sup> See GD3-43.

<sup>28</sup> See GD3-30.

<sup>29</sup> See GD3-43.

<sup>30</sup> See GD3-43.

<sup>31</sup> See document entitled [translation] "Summary of October 13, 2021, meeting.pdf"—GD3-24 to GD3-26.

followed, that the Appellant would be suspended without pay for a day, and that, if she didn't follow them again, she would be let go.<sup>32</sup>

- b) Notice dated October 18, 2021.<sup>33</sup> This document indicates that the Appellant was being suspended without pay for a day—half a day on October 18, 2021, and half a day on October 19, 2021. The document indicates that instructions that weren't being followed were [translation] “marked with a [handwritten note indicating a checkmark].”<sup>34</sup>
- c) Notice dated November 29, 2021.<sup>35</sup> This document indicates that instructions given to the Appellant weren't being followed and that her work wasn't being done effectively or productively (for example, oversights from the previous Wednesday). This document says that the Appellant was given instructions and she was told that she would be suspended for two days if she didn't follow one of them. The document repeats several of instructions from the October 13, 2021, notice, and has other instructions, such as: Eating at the office should be done during the minutes set aside for that in the morning or outside during breaks. The washroom isn't for texting, making phone calls, or eating: [translation] “No more being in the washroom several times in the morning or afternoon.” The document says that the Appellant would immediately be suspended for two days if she didn't follow one of the instructions.<sup>36</sup>
- d) Notice dated December 1, 2021.<sup>37</sup> This document tells the Appellant that she was being suspended as of December 1, 2021, at noon, for not following several instructions and for other reasons, and that she was scheduled to

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<sup>32</sup> See GD3-24 to GD3-26.

<sup>33</sup> See document entitled [translation] “Notice 18-10-2021.pdf”—GD3-24 and GD3-27.

<sup>34</sup> See GD3-24 and GD3-27.

<sup>35</sup> See document entitled [translation] “Notice 29-11-2021.pdf”—GD3-24, GD3-28, and GD-3-29.

<sup>36</sup> See GD3-24, GD3-28, and GD3-29.

<sup>37</sup> See document entitled [translation] “Notice -01-12-2021.pdf”—GD-3-24 and GD3-30.

return to work on December 6, 2021. The document says that she would be let go the next time she didn't follow instructions.<sup>38</sup>

[17] The evidence on file also includes copies of the following documents:

- a) Text messages between the employer and the Appellant, dated December 1, 2021, about her suspension that day<sup>39</sup>. In one of the messages, the employer wrote her the following: [translation] "You're not following instructions. I don't have to list them; you know them [...]. Your work isn't done or is done improperly. Since your contribution at the office is more harmful than useful, the conclusion is self-explanatory [...]."<sup>40</sup>
- b) Record of Employment the employer issued, dated December 10, 2021, in which the following comment appears above block 18 (Comments):  
[translation] "Let go for insubordination and work not done/done improperly."<sup>41</sup>

[18] The Appellant, on the other hand, says she didn't commit any acts that amount to misconduct under the Act. She says the employer discriminated against her, because it asked her to follow instructions it didn't give other employees. The Appellant says the instructions the employer gave her were a form a harassment.<sup>42</sup> She says she made an effort to follow the employer's instructions. The Appellant says that the employer let her go under false pretences.<sup>43</sup>

[19] I find that the Appellant lost her job because of the acts the employer says she committed, such as not following the instructions it gave her, which it considers as falling under insubordination, and, according to what it indicated, because of the work she did improperly or didn't do.

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<sup>38</sup> See GD3-24 and GD3-30.

<sup>39</sup> See GD6-1.

<sup>40</sup> See GD6-1.

<sup>41</sup> See GD3-17.

<sup>42</sup> See GD3-23.

<sup>43</sup> See GD3-38 and GD3-39.

[20] Now, I have to decide whether, on a balance of probabilities, the Appellant committed the acts attributed to her and, if so, whether those acts amount to misconduct under the Act.

## **Issue 2: Is the reason for the Appellant's dismissal misconduct under the Act?**

[21] I find that the Appellant didn't act to deliberately lose her job. The evidence on file doesn't show that she committed acts that amount to misconduct under the Act.

[22] I find the Appellant's testimony credible and place the most weight on it. The Appellant painted a detailed picture of the circumstances that led to her employment being terminated on December 6, 2021. She didn't contradict herself. The Appellant gave specific explanations about the acts attributed to her before she was let go

[23] The Appellant's testimony and statements indicate the following:

- a) She didn't commit any acts amounting to misconduct under the Act.
- b) The Appellant had been working for the employer since mid-August 2015. When she came back from maternity leave on September 5, 2020, the employer gave her fewer tasks and reduced her hours. The tasks she did before were given to another employee.<sup>44</sup>
- c) In October 2021, the employer gave her several instructions for her work that didn't exist before, and that weren't given to other employees. The Appellant says her employer discriminated against her. She says the instructions were a form of harassment that the employer directed toward her. The employer added them so that she would leave her job.<sup>45</sup>
- d) She didn't get many of the documents the employer sent to the Commission summarizing the instructions given to her or the notices concerning her (for

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<sup>44</sup> See GD2B-3, GD2B-4, GD3-19, GD3-38, GD3-39, and GD3-42.

<sup>45</sup> See GD2B-3, GD2B-4, GD3-23, GD3-38, and GD3-39.

example, Summary of October 13, 2021, meeting, the October 18, 2021, notice, and the November 29, 2021, notice).<sup>46</sup> She only became aware of these documents when she got her appeal file.

- e) On October 13, 2021, the employer met with her to go over the instructions that she had to follow from then on. Even though the employer says it gave her a written document summarizing that meeting, it isn't the document the employer sent the Commission.<sup>47</sup> It is another document the employer provided about that meeting. The employer asked her to sign a document on October 13, 2021, but she refused to.
- f) During the October 13, 2021, meeting, the employer told her that she was going to the washroom often. Even though the employer says she went to send text messages while in the washroom,<sup>48</sup> the Appellant says it isn't true. The Appellant says she had to go to the washroom because of a health problem. There was blood in her stool, which may explain why she had to go more often. She told the employer about the situation and that it was a medical issue. The Appellant points out that in October 2022 she had surgery related to that issue.
- g) The employer asked her not to eat at her desk. The Appellant says that this happened once or twice (for example, taking a bite of a dried sausage), because she was really too hungry; her [translation] "stomach was growling" and she wanted to stay focused on her work. She was snacking while working and not eating a meal. It was hard for her to have breakfast in the morning, so she was hungry later. The employer had never stopped her from eating at her desk before.<sup>49</sup>

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<sup>46</sup> See documents entitled [translation] "Summary of October 13, 2021, meeting.pdf," [translation] "Notice 18-10-2021.pdf," and [translation] "Notice 29-11-2021.pdf"—GD3-24 to GD3-29.

<sup>47</sup> See document dated October 14, 2021, entitled [translation] "Summary of October 13, 2021, meeting.pdf"—GD3-24 to GD3-26

<sup>48</sup> See GD3-20 and GD3-21.

<sup>49</sup> See GD3-42.

- h) The employer spoke to her about her tardiness. The Appellant says that most of the time, she got to work a little before 8 a.m.—before the start of her work day. She got to work a few minutes late a few times (for example, 8:02 a.m. or 8:03 a.m.) because of family obligations. She had to take care of her two-and-a-half-year-old daughter. The Appellant can't say when this happened. She says that on one occasion, she had to miss an hour of work to go back home because her daughter triggered the house alarm, which resulted in police going to her home.<sup>50</sup>
- i) The employer spoke to her about her cell phone use and how it was on her desk. The Appellant told it that she kept her phone on, in her purse, and not on her desk. The Appellant only answered important calls, like those from her mother, which were quite rare. The Appellant's mother took care of her daughter. She says that she wanted her mother to be able to contact her if there ever was a problem.<sup>51</sup>
- j) Concerning her breaks, she didn't take them in their entirety.<sup>52</sup>
- k) The Appellant didn't get the October 18, 2021, written notice indicating that a new copy of the instructions given on October 13, 2021, had been given to her [translation] "today [October 18, 2021]," that the instructions she hadn't followed had been [translation] "marked with a [handwritten note indicating a checkmark]," and that she would be suspended without pay for a day—half a day on October 18, 2021, and half a day on October 19, 2021.<sup>53</sup> The Appellant says she doesn't exactly know why she was suspended that day. She says she thinks the suspension was related to certain acts that were attributed to her (for example, tardiness, eating at the office, using her cell phone, or going to the washroom too often).

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<sup>50</sup> See GD2B-3, GD2B-4, GD3-38, and GD3-39.

<sup>51</sup> See GD2B-3, GD2B-4, GD3-38, and GD3-39.

<sup>52</sup> See GD2B-3, GD2B-4, GD3-38, and GD3-39.

<sup>53</sup> See GD3-27.

- l) The Appellant also didn't get the November 29, 2021, written notice telling her that instructions weren't being followed, that her work wasn't being done effectively and productively (for example, oversights), and that she would be suspended for two days if instructions weren't followed.<sup>54</sup>
- m) The Appellant says that the employer told her that she had made mistakes, but it had never told her what her mistakes were. So, she doesn't understand what the employer means when it says that her work wasn't done effectively and productively. It didn't give her concrete answers about that. The employer didn't speak to her about her alleged oversights. The Appellant points out that her files were always done on time and that she usually took notes on the tasks she had to do. Her work was done properly. She doesn't know what oversights the employer is referring to. A list of the Appellant's work was sent to the employer every day. This list had a lot of information, which required a lot of the Appellant's time (for example, describing the work to be done).<sup>55</sup>
- n) The Appellant didn't meet with the employer on November 29, 2021, and wasn't suspended for two days at that time. She worked on November 29 and November 30, 2021.
- o) On December 1, 2021, the employer told her in writing that she was suspended and that she was scheduled to return to work on December 6, 2021.<sup>56</sup> The December 1, 2021, notice wasn't directly given to her. It was put in an envelope and that envelope was placed on her desk. The Appellant became aware of that notice around 1:30 p.m. on December 1, 2021, coming back from her lunch break. She didn't ask the employer about it because it was absent. Even though in the summary of one of her statements to the Commission it is indicated that she was suspended because she had eaten at the office,<sup>57</sup> the employer didn't explain that suspension to her, like she tells

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<sup>54</sup> See GD3-28 and GD3-29.

<sup>55</sup> See GD2B-3, GD2B-4, GD3-38, and GD3-39.

<sup>56</sup> See GD3-30.

<sup>57</sup> See GD3-42.

the employer in the text message she sent on December 1, 2021, at 1:31 p.m.<sup>58</sup> In that text message, the Appellant told the employer that there aren't really any details in the notice it gave her. She asked it if it was because she had had an appointment the previous day—which the employer was aware of—and because she had gotten to the office at 8:02 a.m.<sup>59</sup> The Appellant learned from a colleague that the employer hadn't liked that she had gone back to the office in the afternoon, since she had been suspended as of noon that day, and that she had gone back to work after her lunch break. The employer told her in one of its December 1, 2021, text messages, that it was because she didn't follow one of the instructions.<sup>60</sup>

- p) On December 6, 2021, the Appellant went to work. She arrived two minutes late that day. Even though the employer says she got there about 15 minutes late, that wasn't the case.<sup>61</sup> When she got to work, the employer met with her and told her she was being let go without giving her a reason. She told the employer that before leaving her house to go to work, she had had to take care of her daughter. After, the Appellant's mother took care of her.<sup>62</sup>
- q) The employer sent her a letter, dated December 16, 2021, confirming that she had been let go on December 6, 2021.<sup>63</sup>
- r) The Appellant points out that her work was very important to her and that she did it thoroughly. She moved to be closer to her workplace. If she had intended to leave her job, she would have moved to another place where there are more employment opportunities.<sup>64</sup>

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<sup>58</sup> See GD6-1.

<sup>59</sup> See GD6-1.

<sup>60</sup> See GD6-1.

<sup>61</sup> See GD3-43.

<sup>62</sup> See GD3-42 and GD3-44.

<sup>63</sup> See document entitled [translation] "Letter to [Appellant's name] 16-12-2021.pdf"—GD3-31.

<sup>64</sup> See GD2B-3, GD2B-4, GD3-38, and GD3-39.

[24] In this case, and based on the evidence, I find that the circumstances relating to the Appellant's dismissal don't show that she deliberately set herself up to lose her job. Her dismissal isn't the result of deliberate acts on her part.

[25] I find that the evidence from the employer doesn't show that the Appellant lost her job because of misconduct.

[26] I find that the Appellant's testimony shows that she didn't deliberately commit acts of insubordination by not following instructions the employer had given her to carry out her tasks, and that she didn't do her work or do it improperly.

[27] The employer's statements and the documents it sent the Commission indicate that the Appellant didn't follow many instructions it gave her.

[28] But, besides the Appellant's tardiness on December 6, 2021, the employer doesn't describe—in a way that can be measured and observed—the nature of the acts attributed to her, or when or how they were observed, or in what context they were committed.

[29] The documents the employer sent the Commission don't give details on these points, despite several complaints about the Appellant that she didn't follow instructions given to her.

[30] The Appellant's testimony also indicates that she didn't get several documents the employer sent the Commission describing the instructions she had to follow and specifying which ones it says she hadn't followed (for example, summary of the meeting on October 13, 2021, notices from October 18, 2021, and November 29, 2021).<sup>65</sup>

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<sup>65</sup> See GD3-24 to GD3-29.

[31] The Commission says that the October 13, 2021,<sup>66</sup> document, given to the Appellant on October 14, 2021, explains the progressive discipline used when instructions aren't followed.<sup>67</sup>

[32] But, in its analysis, the Commission falsely found that [translation] "at that moment," the Appellant was suspended for a day and was warned that, if it happened again, the next measure would be suspending her for two days, and the measure after that would be dismissal.<sup>68</sup>

[33] I note that the October 13, 2021, notice<sup>69</sup> doesn't indicate that the Appellant was being suspended at that time—on October 13 or October 14, 2021. Instead, it says that [translation] "measures will be applied if [instructions] aren't followed" and that she [translation] "will be suspended from her job for one day [...]."<sup>70</sup>

[34] The employer's statements and the Appellant's statements don't indicate that she was suspended on October 13 or October 14, 2021. The evidence on file indicates that the Appellant was first suspended on October 18, 2021, for a day.<sup>71</sup>

[35] The employer's written notice, dated October 18, 2021, indicating that the Appellant was suspended without pay for a day—for half a day on October 18, 2021, and half a day on October 19, 2021—says that a new copy of the instructions given on October 13, 2021, was given to her. Instructions that weren't being followed were [translation] "marked with a [handwritten note indicating a checkmark]."<sup>72</sup> But, that document doesn't have any details on which instructions weren't followed that led to that suspension.

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<sup>66</sup> See GD3-25 and GD3-26.

<sup>67</sup> See GD4-9.

<sup>68</sup> See GD3-25, GD3-26, and GD4-9.

<sup>69</sup> See GD3-25 and GD3-26.

<sup>70</sup> See GD3-26.

<sup>71</sup> See GD3-43.

<sup>72</sup> See GD3-27.

[36] On this point, the appellant says she doesn't exactly know why she was suspended at that time. She says she didn't get that notice or the copy of the instructions dated October 13, 2021, that the employer sent to the Commission.<sup>73</sup>

[37] In the November 29, 2021, written notice—which the Appellant says she also didn't get—the employer again says that instructions given to her aren't being followed and that her work wasn't being done effectively and productively (for example, oversight from previous Wednesday), but without giving more details on each of the points mentioned.<sup>74</sup>

[38] The Commission also falsely found that on November 29, 2021, the employer imposed on the Appellant [translation] “a two-day suspension for instructions that weren't followed.”<sup>75</sup>

[39] The November 29, 2021, notice says that there [translation] “will be an immediate two-day suspension for instructions that aren't followed.”<sup>76</sup> The document doesn't say that the Appellant would be suspended for two days on November 29, 2021, or why she would have been suspended. The employer's statements don't indicate that the Appellant was being suspended for two days from November 29, 2021. The Appellant says she worked on November 29, and November 30, 2021.

[40] In the December 1, 2021, notice, the employer told her that she was being suspended for [translation] “not following many instructions” and other reasons, specifying that her return to work was scheduled for Monday, December 6, 2021.<sup>77</sup> That notice also doesn't give more details about the instructions the employer says weren't being followed, or about the other reasons for that suspension.

[41] The employer's statement to the Commission, dated March 22, 2022, doesn't give more details about when it suspended the Appellant on December 1, 2021, where

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<sup>73</sup> See GD3-25 and GD3-26.

<sup>74</sup> See GD3-28 and GD3-29.

<sup>75</sup> See GD4-9.

<sup>76</sup> See GD3-29.

<sup>77</sup> See GD3-30.

it indicates that it initially suspended her for one day—half a day on the afternoon of October 18, 2021, and half a day on the morning of October 19, 2021—and that she was then suspended for not following instructions, because she had eaten at her desk.<sup>78</sup>

[42] I find contradictory the employer’s reasons for suspending the Appellant after the October 18, 2021, suspension, since the December 1, 2021, notice mentions [translation] “not following several instructions” and other reasons, without specifying which instructions or the other reasons.

[43] The evidence on file indicates that after becoming aware of the December 1, 2021, notice, the Appellant sent the employer a text message to get an explanation about that suspension.<sup>79</sup> In that text message, the Appellant asked it if it was because she had an appointment the previous day—which the employer was aware of—and because she got to the office at 8:02 a.m.<sup>80</sup>

[44] The employer responded, among other things: [translation] “You’re not following instructions. I don’t have to list them; you know them [...]. Your work isn’t done or is done improperly.”<sup>81</sup>

[45] I also point out that in the December 1, 2021, notice, the employer told the Appellant that she was being suspended as of noon that day, and that she was scheduled to return to work on Monday, December 6, 2021.<sup>82</sup> That is a suspension that lasts over two days—in the November 29, 2021, notice, the employer specified that it would apply a two-day suspension if she didn’t follow instructions. If a two-day suspension had been applied like the employer had indicated, the Appellant should have returned to work as of the afternoon of Friday, December 3, 2021, not December 6, 2021.

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<sup>78</sup> See GD3-43.

<sup>79</sup> See GD6-1.

<sup>80</sup> See GD6-1.

<sup>81</sup> See GD6-1.

<sup>82</sup> See GD3-30.

[46] I understand that, despite the many instructions the employer gave the Appellant, it didn't show which ones she allegedly consciously chose not to follow and that could be misconduct under the Act.

[47] The Appellant recognizes that she didn't follow some of the employer's instructions.

[48] But, I find that her explanations show that she didn't intentionally commit acts of insubordination by not following some of the instructions that were given to her and that can fall under misconduct under the Act.

[49] About using the washroom, I understand that the Appellant had to go frequently for medical reasons and not to eat or write text messages, like the employer said.<sup>83</sup> I find the Appellant's statement credible that she told the employer that she had to go to the washroom often for health reasons. The employer's statements don't contradict the Appellant's statement on this point.

[50] About the fact that the Appellant had eaten at her desk once or twice, I am of the view that it wasn't a deliberate act that can fall under insubordination. It was more an act to fulfill a basic need to help her stay focused and functional at work because, as she says, she was too hungry. On this point, I also understand from the Appellant's explanations that it was difficult for her to have breakfast. I also understand that the employer was aware of that problem, as it indicated in one of its statements.<sup>84</sup> But, the employer didn't indicate why it had given the Appellant that instruction.

[51] I also find credible that the Appellant's late arrivals to work do not represent deliberate acts on her part. I understand from the Appellant's explanations that her tardiness was above all because of family obligations that she had to attend to, which happened only a few times, and that she was late by a few minutes. Everything

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<sup>83</sup> See GD3-20.

<sup>84</sup> See GD3-20.

suggests that it wasn't a problem that recurred, or showed recklessness, or that was wilful.

[52] I point out that, with the exception of the Appellant's tardiness on December 6, 2021, the employer didn't specify when she was late to work or the context where it allegedly happened, or if it had given her a notice for being late that time.

[53] Even though the Commission says that, when she returned work on December 6, 2021, after being suspended for five days, the Appellant had to be at her workstation at 8 a.m., but that she was late [translation] "once again," it doesn't specify when that had happened before December 6, 2021. The Commission relied on an unproven statement from the employer.

[54] Despite the employer's statement that when the Appellant was late to work on December 6, 2021, it meant that she wasn't ready to follow instructions,<sup>85</sup> that statement doesn't show what her intentions were. On this point, the Appellant says that she was late by a few minutes because she had to take care of her daughter.

[55] I find it paradoxical, to say the least, that the employer concluded that because of her tardiness on December 6, 2021, that meant that she wasn't ready to follow instructions, when—just a few days before—when it suspended her on December 1, 2021, it wrote her that her [translation] "contribution at the office is more harmful than useful [...]."<sup>86</sup>

[56] I don't accept the Commission's argument that the Appellant [translation] "chose to disregard" the employer's last notice on December 1, 2021, about the risk of dismissal for not following instructions again, and that it was a [translation] "deliberate breach" of a clear directive, and a form of insubordination.<sup>87</sup>

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<sup>85</sup> See GD3-43.

<sup>86</sup> See GD6-1.

<sup>87</sup> See GD3-30 and GD4-11.

[57] About the Appellant using her phone, I am also of the view that the fact that she kept it on, in her purse, while at work, is also not an act that falls under misconduct under the Act. I find credible the Appellant's statement that she wanted to make sure she could be reached easily if there was a problem with her daughter. I find that by keeping her cell phone on, the Appellant's intention was to make sure that she could attend to her family obligations without it keeping her from carrying out her work duties—it wasn't to act in insubordination.

[58] About the employer's statements that the Appellant didn't do her work or did it improperly—another reason it relies on for dismissing her—I don't find its information compelling to show that her acts were intentional or deliberate on her part.

[59] In the November 29, 2021, notice, the employer says that the Appellant's work wasn't being done effectively and productively (for example, oversight from previous Wednesday), but it doesn't give more details on that point.<sup>88</sup>

[60] Even though the employer's statements also indicate that errors were found in files and that it took at least two days of work to correct them,<sup>89</sup> it doesn't specify which errors could be attributable to the Appellant, or how they could have been wilful or intentional.

[61] The employer's statement that the Appellant showed a [translation] "kind of incompetence" also doesn't show that she deliberately chose not to do her work or to complete it improperly.

[62] I also point out that even if the employer says that the Appellant seemed [translation] "unaware" of the problems she had performing her work, and that she wasn't concerned with how they could affect her job, it says that it doesn't believe she tried to be dismissed on purpose.<sup>90</sup>

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<sup>88</sup> See GD3-28 and GD3-29.

<sup>89</sup> See GD3-22.

<sup>90</sup> See GD3-20 and GD3-21.

[63] I am also of the view that the text message the employer sent the Appellant after it suspended her on December 1, 2021, where it said that her [translation] “contribution at the office is more harmful than useful,”<sup>91</sup> doesn’t convince me that she allegedly committed acts of insubordination, or that she didn’t carry out her work or did it improperly, either wilfully or recklessly.

[64] In summary, I find that the Appellant didn’t commit acts that were conscious, deliberate, or intentional and that can be considered misconduct.

[65] I am of the view that it isn’t enough to state a series of instructions, and then add on to them like the employer did with the Appellant, and then say that they haven’t been followed to show that they’re reprehensible acts that amount to misconduct while failing to provide compelling evidence.

[66] I find that the Appellant didn’t consciously choose to ignore the standards of behaviour that the employer had a right to expect of her. She didn’t breach an express or implied fundamental duty resulting from the contract of employment. She didn’t demonstrate recklessness when performing her work.

[67] I find that the Appellant could not have known that her conduct was a breach of her duties toward her employer and that there was a real possibility of being let go for the acts attributed to her.

[68] In my view, the Appellant’s acts weren’t of such scope that she could normally foresee that they could result in her dismissal.

[69] The Commission hasn’t proven that the Appellant intentionally lost her job. I am of the view that, in this case, the Commission hasn’t met its burden of proving whether the Appellant’s acts amount to misconduct.

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<sup>91</sup> See GD6-1.

[70] The Court tells us that the Commission has to prove the existence of evidence showing a claimant's misconduct.<sup>92</sup>

[71] In my view, the Commission's evidence is inadequate and not detailed enough to find, on a balance of probabilities, that the Appellant lost her job because of misconduct.

[72] I find that the Commission didn't consider the Appellant's side of the story, including her credible, specific, and detailed testimony, concerning the acts attributed to her and the circumstances that led to her dismissal.

[73] I am of the view that the Commission was quick to accept the employer's statements in finding that the Appellant had lost her job because of misconduct.

[74] Even though the Commission found that the Appellant lost her job because of [translation] "bad behaviour,"<sup>93</sup> it hasn't shown how the Appellant's alleged acts were intentional and could fall under misconduct under the Act.

[75] I am of the view that the Appellant's behaviour instead shows that she made efforts to adapt to the mounting instructions her employer gave her, and to the disparaging comments it made about her job performance before her dismissal.

[76] The Court also tells us it must be established that a claimant was let go because of misconduct.<sup>94</sup>

[77] I find that the Appellant wasn't let go because of acts she committed wilfully and deliberately.

[78] The reason for the Appellant's dismissal isn't misconduct under the Act.

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<sup>92</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>93</sup> See GD4-10.

<sup>94</sup> The Court established or reiterated this principle in the following decisions: *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

## **Conclusion**

[79] The Commission hasn't shown that the Appellant lost her job because of misconduct.

[80] As a result, the Commission's decision to disqualify her from receiving EI regular benefits from December 5, 2021, isn't justified.

[81] This means that the appeal is allowed.

Normand Morin

Member, General Division – Employment Insurance Section